for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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THE FUNDING BATTLE: Forcing the Defense to Pay to Interview the State's Expert Witnesses

By Donna Elm
Deputy Public Defender

There's a new front looming in the war for justice in Maricopa County. Defense attorneys seeking to interview state's experts are being told that they must pay for interviews, often up-front.

Since at least the mid- 1970's, there has been a simple rule-of-thumb in Maricopa County as to expert payments: The party noticing an expert pays all of his fees (including opposing party's interviews). This makes sense, due to the contractual relationship (including an enforceable obligation to pay) between the party calling the expert and that expert. Generally, the County Attorney has a larger number of experts retained for trials than the defense bar. As a consequence, their office was budgeted for greater expert fees than the Public and Legal Defender's Offices and the Office of Court-Appointed Counsel.

Despite this financial allocation and any constitutional and ethical obligations, in about 1994, the Maricopa County Attorney's Office unilaterally decided it would no longer pay for defense interviews of its expert witnesses. The issue has been litigated several times since then. Associate Criminal Presiding Judge Gregory Martin has twice ruled that "indigent defendants do not have to pay for state expert interviews." After several other rulings with varying results, the County Attorney's Office largely gave up on the issue, and the former practice resumed unimpeded.

In the past couple months, it has reared its ugly head again. The defense is being told that it must pay (often up-front) for an interview of a state's expert. When asked why, the County Attorney asserts it is "per an agreement worked out with the defense bar." Do not be fooled: No such agreement exists with the Public Defender's Office, Legal Defender's Office, Office of Court-Appointed Counsel, or Arizona Attorneys for Criminal Justice. Rather, the contrary agreement (that each side pays for its own experts) had been reached long ago.

The Public Defender's Office is once again litigating the issue in Maricopa County. It has an impact on other indigent defense agencies and private practitioners. Persons encountering this impasse with the Maricopa County Attorney's Office should contact Russ

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Born or Donna Elm of the Maricopa County Public Defender's Office to coordinate efforts, join cases, and for mutual assistance. The litigation has sometimes focused on the question of who should pay? However, as between county defense and prosecuting agencies, there is case law indicating that a court cannot assess costs against one branch of the county, but can only order that the county pay. *See Berger v. Rose*, 112 Ariz. 588, 545 P.2d 45 (1976). Instead, the issue must be framed as a discovery right: by requiring the defense to pay to interview state's experts, the prosecution is not complying with disclosure duties and is in fact erecting a barrier to discovery. Thus rather than litigate who pays for an interview, the defense has instead demanded the interview, pointed out that it has not been funded to pay state's experts, refused to pay, and (when the expert declines) moved for court-ordered interview. The following is a discussion of the various legal and practical grounds that may be cited in attacking this issue.

"Effective investigation and confrontation includes interviewing witnesses against the defendant."

Constitutional Grounds

A number of constitutional guarantees provide for discovery of witness statements, including interviews. The rights to confrontation, to effective assistance of counsel, and to defend, subsume the ability to investigate a case effectively and thus prepare adequately for trial, as well as the right to effectively confront evidence against the defendant during trial. U.S. Constitution, 6th, 14th Amendments; Arizona Constitution, Art. 2, §24. Effective investigation and confrontation includes interviewing witnesses against the defendant. *Windom v. Cook*, 423 F.2d 721, 721 (5th Cir. 1970).

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The right to a fundamentally fair prosecution provided in the due process clauses includes basic "notice" entitlements. U.S. Constitution, 5th, 14th Amendments; Arizona Constitution, Art. 2, §4. That patently includes the right to know what witnesses against the defense would testify to. The Arizona Constitution provides an additional right related to due process: the right to "demand the nature and *cause* of the accusation against him." Art. 2, §24. Demanding the cause of the accusation means that the defense has a right to know the facts which support the charges -- including expert evidence. Due process also requires the state to disclose evidence which could exculpate the defendant or impeach the state's evidence, *i.e., Brady* and *Giglio* evidence. Interviewing state's experts allows the defense to explore weaknesses in their testimony and sometimes use their expertise to support a defense.

There are also constitutional guarantees preserving these rights for an indigent accused. These arise from, and are the progeny of, the right to counsel. But there was a separate and significant clause added to the Arizona Constitution. Drafted at the close of a lengthy list of rights a defendant is guaranteed in a criminal prosecution (including to defend, counsel, demand the cause of the accusation, and meet the witnesses face to face), it provides that

> ...in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.Art. 2, §24.

Hence, defendants cannot be compelled to pay for discovery; rather, they are entitled to free access to the evidence the state intends to use against them. Significantly, there is nothing in this clause restricting it only to the indigent; therefore, the state must bear financial burden for prosecuting the accused, including providing discovery of all their witnesses.

Ethical Obligations of Disclosure

Ethical rules prescribe that the state must cooperate with disclosing its evidence, and proscribe that the state must not interfere with discovery. The Arizona Ethics Rules place additional obligations on prosecutors to marshal evidence fairly. ER 3.4 provides that a lawyer shall not:

> (d) in pretrial procedure ... fail to make reasonably diligent effort to comply with

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> a legally proper discovery request by an opposing party.

Prosecutors are also required to avoid obstructing the defense's access to a witness. ER 3.4 also provides that a lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence, ... A lawyer shall not counsel or assist another person to do such act; ...
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party ...

See also ABA Discovery Standards, 11-4.1. There is a substantial body of case law finding misconduct when the prosecution somehow discouraged cooperation in interviews. *State v. Chancy*, 5 Ariz. App. 530, 534-35, 428 P.2d 1004, 1008-09 (1967) (though not categorically instructing witnesses to refuse interview, the prosecutor actively discouraged it); *United States v. Cook*, 608 F.2d 1175, 1179-81 (9th Cir. 1979), *cert. denied, 100* S.Ct. 706 (1980) (though not "officially forbidding" an interview, the prosecutor effectively stalled and frustrated it by hiding the witnesses in a protection program); *State v. York*, 291 Ore. 535, 632 P.2d 1261, 1262-65 (1981) (prosecutor told witnesses they could choose to refuse, and it "would be better" if they did); *United States v. Linton*, 502 F.Supp.871, 875-76 (D. Nev. 1980)(prosecutor disapproved of witness's expressed willingness to interview).

"There is a substantial body of case law finding misconduct when the prosecution somehow discouraged cooperation in interviews."

Rule 15.1 Discovery Obligations

Rule 15.1 (a)(1,3), Ariz. R. Crim. P., specifically requires the state to identify all persons (including experts) whom they will call at trial, together with their statements/reports. Arizona courts have interpreted Rule 15.1 (a)(3) as "directed at expert testimony and is designed to give the defendant an opportunity to check the validity of the conclusions of an expert witness and to call such expert as his own witness or to have the evidence examined by his own independent expert witness." *State v. Spain*, 27 Ariz. App. 752, 755, 558 P.2d 947, 950 (App. 1976), *rev. denied (1977)*. Rule 15.1, then, must be interpreted to provide discovery that would allow the defense to challenge the expert. As the court stated in *York*, it is hardly consistent with the rule requiring disclosure of the state's witnesses' names, not to allow an interview. 632 P.2d at 1263.

Common Law Rights to Interview Witnesses

The 1974 revisions of the Arizona criminal rules significantly increased discovery rights in the state system. But even before those changes, courts recognized a "general rule" entitling the defense to interview witnesses. The Arizona Supreme Court frequently cited this principle:

> It is the general rule that the defendant and his counsel have the right to talk with any witness having knowledge of matters which might be beneficial or detrimental to him. ... It is only in exceptional circumstances that counsel should be barred from interviewing a witness ...

State v. Wise, 101 Ariz. 315, 317, 419 P.2d 342, 344 (1966); *Chaney*, 5 Ariz. App. at 535, 428 P.2d at 1009; *State v. Ford*, 108 Ariz. 404, 409, 499 P.2d 699, 704 (1972). In addition, the Supreme Court placed an obligation on the state to produce its evidence. See *State v. Castaneda*, 111 Ariz. 264, 266, 528 P.2d 608, 610 (1974). In *Ford*, the Supreme Court articulated a broad preference or presumption in favor of defense discovery:

> We believe that a trial court should exercise its discretion in favor of seeing that the accused is furnished with every fact necessary to prepare the best possible defense. The modern trend in discovery proceedings is to have the winner determined by the facts, rather than by which side is the most ingenious in "playing the game."

In *State v. Draper*, 158 Ariz. 315, 318, 762 P.2d 602, 605 (App. 1988), *rev. granted* (on other grounds), the prosecutor improperly conditioned a plea offer on the defense foregoing witness interviews. This violated his due process rights as well as "cases [which] solidly support the proposition that a defendant has a right to attempt to interview witnesses." Moreover, the Court equated precluding interviews with a *Brady* violation:

> While we presumably do not deal with undisclosed exculpatory evidence here, there is a strong similarity between the prosecutor's failure to disclose exculpatory evidence and the prosecution's foreclosure of the defendant's right to attempt to discover exculpatory evidence himself.

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Practicalities of Retaining Expert Witnesses

There are many practicalities appealing to common sense that touch on this issue. Witness interviews are invaluable -- not only to preserving the rights of criminally accused persons and maintaining a fundamental fairness in the justice system, but they also positively affect many aspects of a case. A federal jurist wrote:

> Our discovery system is not meant to obfuscate the truth. On the contrary, it is a means of obtaining the ultimate objective of a criminal trial, which is to ascertain the truth. Access to witnesses before trial is a great aid in preparation for trial. As such, it tends to expedite proceedings, minimize the element of surprise, and help in the search for truth. ...
>
> Cooperation by a witness in permitting a pre-trial interview may result in his testimony having more credibility with the trier of fact. This is because a witness's refusal to talk with counsel may be brought out in trial as evidence of the witness's possible bias. ... Further, it might be advantageous to grant an interview, because the witness may control the setting and scope of the interview.
>
> The alternative to an interview, where the interest of justice requires, is a deposition. ... The possibility that a witness may be subjected to a deposition whose scope and conditions are set by law might serve as an inducement to that witness to grant a pre-trial interview whose scope and conditions would be set by himself

Linton, 502 F.Supp. at 875-76.

Another practical issue is: which party is best situated to pay these fees? The Maricopa County Attorney's Office's expert fees budget dwarfs those of the indigent defense agencies in the county. Each defense office is budgeted to pay for *defense* experts. Moreover, clients who can barely manage to scrape together enough money to retain private counsel may not be able to afford sometimes exorbitant fees of pricey prosecution experts; paying state's experts may mean that they would have no money left to hire defense ones. Hence, the County Attorney is best funded to handle these expenses.

Similarly, when experts are retained, the party hiring them contemplates the price range. The County Attorney may select a high-priced expert -- or several. The defense should not be asked to shoulder the burden of expert fees it had no opportunity to control; the inverse also applies. This is what underlies the former practice of paying all fees of your experts: You undertake the fees that you negotiate and contract for, not those negotiated and contracted for, by your opponent. An underbudgeted defense agency or client of limited means could be priced right out of a defense by a funding strategy at the mercy of the better-funded party.

In addition, it makes *sense* as public policy to have the party hiring experts pay all their fees. What would happen if the client or budget office of the defense agency does not pay the interview fee? The party to whom the experts would turn is the one that contracted with them. Otherwise, with the possibility of being "stiffed," there would be a decrease in the pool of experts willing to undertake criminal cases. Hence public policy favors placing all the expense for experts on the party that *contracts* with those experts.

"Finally, there is something *inherently wrong* with making the accused *pay* to be prosecuted."

Furthermore, the payment of an expert by *both* parties may be improperly argued at trial. For instance, the state may rebut impeachment of bias by pointing out that the expert was paid by the defense as well as the state. Moreover, the state may improperly characterize their experts as neutral or mutually-respected authorities, since both parties paid them.

Finally, there is something *inherently wrong* with making the accused *pay* to be prosecuted. This has never been a citizen's duty; the underpinnings of our constitutional system of justice is, if the state wants to deprive its citizens of life or liberty, it must assume the initiative for prosecuting a case, marshal the evidence, bear the burden of proof, prosecute speedily, and sustain the expense of both its own prosecution and that of the defense. The state attempts a subtle shift of its obligations onto the accused here. It is both unconstitutional and unconscionable. ■

Editor's Note: This article appeared in the April 1998 issue of The Defender, and is reprinted herein with the permission of Arizona Attorneys for Criminal Justice.

UNTRUE CONFESSIONS

By William D. Hostetler
Deputy Legal Defender

"OK, I did it. *Now leave me alone.*"

Sorry, you just bought yourself a ticket to the Table of Death. Or maybe, if you're lucky, you can trade for what's behind door number two: life without parole.

Maricopa County became notorious for the way sheriff's detectives "solved" the temple murder case. Somehow, they were able to get four totally innocent men to confess to the worst crime in Arizona history. How did this happen? What special skills did these officers possess, that allowed them to wring out of the human soul, a false admission of wrongdoing?

For dessert: during plea bargaining, one of the real killers revealed his responsibility for yet another murder: the brutal campground slaying that someone else had been charged with and spent time (over a year) in jail for, based on his own false confession.

Amazing coincidence?
Proof that the system works?
Or are the implications as ominous as they seem?

Far from being an isolated black eye for Arizona law enforcement, the phenomenon of coerced confessions in the post-Miranda age may be more prevalent than anyone cares to imagine. Phoenix psychiatrist T. N. Thomas believes that "coerced confessions are far more common than previously thought."

" . . .in an often misguided effort to break down a suspect's resistance, interrogators may employ techniques that result in the wrong person being convicted."

Psychological techniques may have replaced physical torture, but some law enforcement officers are apparently trained to tap into that undefined guilt that many of us carry deep within us (see *Genesis*). Isolation, fatigue, false "evidence," and phony polygraph results are some of the tools that result-oriented authority figures use to overwhelm the will of someone they are convinced is guilty.

Even though the temple murder fiasco brought unwanted attention to this issue, like the O.J. Simpson case brought attention to "the best police department in the world," the long-range result may be a better, fairer criminal justice system. While many scoff at the wider implications, one does not have to look far to see that none of this is unusual or new:

> Brainwashing is the process of deliberately subjecting individuals to physical and psychological hardship in order to alter their thoughts, attitudes, and actions. It differs from other forms of persuasion or instruction, not only in the key element of coercion but in the radical intent to clear the mind totally of one set of ideas and replace them by another, often completely opposed set.
>
> The two aspects of brainwashing are 1) confession of past crimes or errors, and 2) re-education to new beliefs. Prisoners are brought to confess by lack of sleep, food, as well as other forms of intense physical discomfort, isolation from familiar surroundings, and a prison routine requiring absolute obedience . . . .
>
> [Some techniques] have been used for centuries; The Inquisition, for example, elicited confessions from alleged heretics by similar methods. [2]

Many criminal defendants already *feel guilty* about something they have done, or failed to do, in the past. Often they are drug addicted, or scared, or they have a disordered or inadequate personality. These factors provide fertile ground for the seeds of false confession.

Psychologically induced false confessions are not limited to Maricopa County, or even to the United States. After the false confession scandal of the suspected Irish terrorist portrayed by Daniel Day Lewis in the movie *Sins of the Father,* England passed the PACE act of 1984, which prohibits such coercive practices. In the United States, however, interrogation may include such techniques as: telling suspects that it is futile to deny their involvement, bluffing that incriminating evidence exists, minimizing the consequences of confession, or advising suspects that it is in their best interest to confess. [3]

Policemen on both sides of the Atlantic express dismay at the prospect of the diminished numbers of confessions such protective laws may create, but the real

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aim is to raise the likelihood that the right person confesses. For one thing, when a suspect ends up agreeing with allegations made in an accusatory interview, it becomes impossible to sort spontaneous guilty knowledge from a mere "echo" of information provided by the interrogator. [4]

For years before *Miranda*, Scotland Yard and the FBI required their agents to advise suspects that anything they say might be used against them. This is not only to differentiate the good guys from the bad, but helps block a later claim that the suspect was tricked into confessing. It makes the confession stronger. [5]

As the temple murder case illustrates, it is now time to enact more stringent protections against coercive interrogation tactics. Not because we are against the police, but because, in an often misguided effort to break down a suspect's resistance, interrogators may employ techniques that result in the wrong person being convicted.

Since most legislators are afraid to be seen as "soft on crime," such protections are probably not on the menu for this country any time soon. In the meantime, it is up to the American trial lawyer, through the jury, to protect these rights. Next time your client tells you about the coercive atmosphere surrounding his recanted confession, it may actually be in the interest of justice to investigate the claim.

"Next time your client tells you about the coercive atmosphere surrounding his recanted confession, it may actually be in the interest of justice to investigate the claim."

Most people trust the police. I usually do. But in some cases, it would be worthwhile to enlist an experienced forensic psychologist, or perhaps a former police detective, to help expose a coercive interrogation. In addition to expert testimony on "investigative techniques," such a person can help the attorney conduct a step-by-step cross-examination of the interrogators, exposing an otherwise skeptical jury, to the likelihood that a false confession was obtained. ■

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[1] T.N. Thomas: *Polygraphy and Coerced-compliant False Confession: "Serviceman E" Recevivus,* Science & Justice Journal of the Forensic Society, April-June 1995.

[2] 3 *The Grolier Encyclopedia of Knowledge* 275.

[3] T.N. Thomas: *Mea Culpa, Mea Maxima Culpa!, The Psychology of Interrogation and Confessions.*

[4] *Ibid.*

[5] Ironically, the advice of rights can become a coercive tactic when given in a casual or off-hand way. Slipped into conversation, it gives the impression that the police officer is fair, impartial, and even friendly to the suspect. Nevertheless, the suspect has now been *Mirandized* on the record, probably without even realizing it.

Editor's note: Phoenix lawyer William D. Hostetler has been a prosecutor and a criminal defense attorney during his 23-year legal career. In addition to his recently completed novel The Toughening, he has written a television anthology, a children's book, and four screenplays.

"ENTER THE JURY ROOM" WINS AWARD

By Jim Haas
Senior Deputy

The CBS News documentary "Enter the Jury Room," which featured several of our attorneys, has received a duPont-Columbia University Journalism Award for overall excellence. The program was one of twelve selected out of 626 submissions of programs that aired in 1996-97. The program aired last April, and featured trials conducted by Tim Agan and Patricia Riggs, Jeremy Mussman and Curtis Beckman, and Elizabeth Feldman and Michelle Allen. It also included interviews with the attorneys and judges and presented taped excerpts of the jury deliberations. This was only the second known time that actual jury deliberations were filmed.

The award was presented to CBS anchor Ed Bradley on January 14, 1998. On January 27, John O'Leary, Chairperson of the ABA's Public Dialogue Task Force, which helped produce the program, sent the following memo to members of the Task Force and others involved with the project. James Ryan, an attorney with Streich Lang and a member of the Task Force, forwarded the memo to Dean Trebesch, Rick Romley, and Judge Reinstein, with the following letter:

> Dear Judge Reinstein:
>
> I just received the enclosed memorandum concerning the duPont-Columbia Journalism Award that "Enter the Jury Room" received earlier this month. The memorandum copies everyone except for the court and the lawyers most directly involved in the

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project. Accordingly, I am also sending copies to the County Attorney's Office and the Public Defender's Office. Everyone involved in this effort has reason to be proud.

Best Regards, James A. Ryan.

MEMORANDUM

TO: Public Dialogue Task Force Members and Colleagues
FROM: John O'Leary
RE: duPont-Columbia Journalism Award for "Enter the Jury Room"
DATE: January 27, 1998

As some of you now have heard, we have just received some terrific news from the Columbia School of Journalism.

On January 14, "Enter the Jury Room," the CBS News documentary produced with the support of the Section of Litigation, the Arizona Supreme Court and the Main Supreme Judicial Court, won a prestigious duPont-Columbia University Award for overall excellence among local, network, radio and cable programs aired in 1996-1997.

For 56 years, the duPont-Columbia Award has been given to stimulate the best in broadcasting. This year's twelve winners were selected by a seven-member awards jury chaired by the dean of the Columbia School of Journalism. The jury selected the dozen award-winners from 626 submissions that first aired between July 1, 1996 and June 30, 1997.

"Enter the Jury Room" first aired nationally on April 16, 1997 on CBS Reports. The 156 hours of out takes from the four Phoenix trials that were the subject of this program should be delivered very shortly to the Tulane School of Law in New Orleans where they will be available for scholarly research on jury deliberations. In addition, videocassettes of "Enter the Jury Room" now are available to the public, for $24.98 plus $4.95 shipping and handling, by simply calling 1-800-934-NEWS. Transcripts of the documentary are available, at a cost of $10.00, by contacting Burelle's Transcripts at 1-800-777-TEXT.

"The 156 hours of out takes from the four Phoenix trials that were the subject of this program should be delivered very shortly to the Tulane School of Law in New Orleans where they will be available for scholarly research on jury deliberations."

CBS anchor Ed Bradley accepted the award at a Columbia ceremony in New York City hosted by CNN senior international correspondent Christiane Amanpour and televised on PBS stations nationwide.

Each duPont-Columbia award is inscribed with Edward R. Murrow's famous observation on television: "This instrument can teach, it can illuminate; yes, it can even inspire. But it can do so only to the extent that humans are determined to use it to those ends. Otherwise, it is merely wires and lights in a box."

For teaching, for illuminating, for inspiring, once again, bravo for CBS News and, in particular, senior producer and writer David Schneider, correspondents Ed Bradley and Richard Schlesinger and producer Jonathan Klein, who in August 1995 first brought the idea for this remarkable project to the American Bar Association and our Section of Litigation Task Force on Public Dialogue.

And thanks to each of you for your contribution to fostering public dialogue on the role of jury deliberations in our American system of justice through this remarkable documentary.
(End of memorandum) ■

DRUNK DRIVING AND POLITICAL EXPEDIENCY (?)

By Clifford Levenson
Deputy Public Defender

Editors Note: This is a reprint of an article that ran in the Scottsdale Tribune in December, 1997. It is accompanied by an author's update.

The holiday season is a time for many traditions. A relatively new one is increased media attention to the carnage wrought by drunk drivers, and proposals to deal with it. As surely as editorial pages will urge a return to the spiritual celebration of the holidays (and all the other pages will be filled with ads urging a more materialistic celebration) there will be calls for increased penalties for drunk driving. From my perspective, the results of my own unscientific survey suggest a much simpler approach--increase public awareness of the very serious consequences already on the books, for those who repeatedly or egregiously drink and drive.

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As a public defender, I represent dozens of people charged with drunk driving. My clients are of both genders, and are of diverse ages, races and socio-economic backgrounds. One of the things I most commonly hear from my clients, when I advise them of the range of penalties to the charged offense, is shock at just how serious they can be. For example, a second drunk driving conviction within a 60 month period means a *minimum* of thirty days in jail--and sixty more if a alcohol education and treatment program is not completed. This is in addition to the fine, the suspended license, and the skyrocketing cost of auto insurance with such a conviction. For a third conviction within sixty months, or for drunk driving with a suspended license, the minimum penalty includes the revocation of the driver's license and *four months* in prison--not jail--with no "good time" credit, no work release, and no early release or deferred incarceration. This is felony drunk driving, so all the loss of civil rights attendant to any felony conviction come with it. Probation in a felony drunk driving case can be up to ten years, and if there is a probation violation, a judge can impose 1.5 to 3 years in prison.

" These laws have no deterrent effect if people don't know about them."

The legislature imposed these harsh penalties, presumably, to deter as well as punish drunk drivers. These laws have no deterrent effect if people don't know about them. Tinkering with existing drunk driving laws is a time consuming, expensive proposition. After taking up legislative time, a new law means already busy cops, lawyers, judges and probation officers will have to take the time to learn about implementing it--to say nothing of the loopholes and other problems that could arise if the legislature's work product is less than perfect. Time and resources are better spent educating the public about the hell that already awaits the convicted drunk driver. In order for Arizona's already stringent drunk driving laws to serve as a deterrent to drunk driving, the public needs to be more aware of them. Let's give the existing laws a real chance to work.

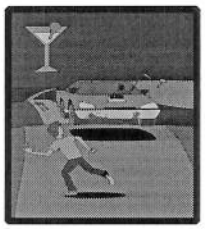
Author's Update:

Since my column consisting of the above paragraphs was published in the Tribune in late December, a couple of things have occurred that reinforce my perspective that lack of awareness is a problem not only for drunk drivers, but drunk driving zealots as well.

First, in addition to several hostile letters, the Tribune printed a response to my column from the executive director of the Center Against Drunk Driving, the organization advocating "Loper's law." After questioning whether I had missed the day of law school when "ignorance of the law is no excuse" was taught, the director went on to describe the provisions of Loper's Law, and called for a massive public education campaign to inform the public about the serious penalties for drunk driving. Yes, this does sound like dejá vu all over again (see *supra*).

Loper's law mandates stiffer penalties for drivers convicted of BAC of .15 and above, and introduces a device which requires a probationer to blow into a breathalyzer-like device in order to start his or her vehicle. As I pointed out in my reply to tho Loper's law advocate (which the Tribune, presumably in the interest of public hysteria, did not print), the provisions of Loper's Law could be implemented by sentencing judges without the expense and problems inherent in new legislation. One important difference with the new law, I guess, is that the Loper's Law advocates can give themselves a pat on the back.

Secondly, the state legislature is now in the process of passing Loper's Law. Drunk driving seems to be one of those "hot button" issues which lead rational, well-intentioned people to polemic positions. This phenomena unfortunately dovetails with the political expediency of appearing to "get tough" on drunk drivers, and results in unnecessary legislation. To the extent that the legislature is distracted from dealing with real solutions to real issues, Loper's Law and other "get tough on crime" bills harm the public as a whole--as well as some of our clients. Meg Wuebbels, our legislative liaison, fights the good fight for a rational approach down at the Capitol, but each of us can help too, by discussing these "hot button" issues with friends and family. We should be advocating rationality--and ultimately, justice. Politicians--and laws--that beat up on easy targets like drunk drivers or child molesters or juvenile pistoleros are pandering to ignorance, and ultimately creating more harm than good. From our perspective, in the thick of the criminal justice system, we can and should advocate not just for our clients in court, but for systemic sanity in the court of public opinion. ■



ARIZONA ADVANCED REPORTS

By Terry Adams
Deputy Public Defender - Appeals

***In re Franklin,* (260 Ariz. Adv. Rep. 7 CA 1, 1/13/98)**

The defendant, a juvenile, was with a large group of juveniles outside the state fair. Two police officers, sensing trouble, approached them. The defendant and others walked away. The cops called to them, wanting to speak with them. The defendant shouted profanities and asserted that he didn't have to talk to the cops. He was eventually arrested and charged with disorderly conduct. The court reversed the conviction stating that Arizona's disorderly conduct statutes require "fighting words" to sustain a conviction. Specifically, words that are likely to inflict injury or incite a breach of the peace. Here the defendant was asserting his rights, but not starting a fight.

***State v. Cramer,* 260 Ariz. Adv. Rep. 5 (CA 1, 1/13/89)**

The defendant pled guilty to Agg. D.U.I. which was based on his licence being suspended for a previous reckless driving conviction. Pending sentencing, the previous conviction was set aside and the order of revocation was rescinded. The defendant sought to withdraw his plea, arguing that his licence was no longer suspended and therefore the plea was void. The court held that at the time of his driving while intoxicated his licence was suspended and he knew it. Therefore, there was sufficient factual basis for the plea, and the trial court properly refused to allow him to withdraw.

***Lind v. Superior Court,* 261 Ariz. Adv. Rep.20 (CA 1, 1/27/98)**

A valley hospital routinely draws more blood than is necessary for medical purposes from automobile drivers involved in accidents and sets it aside for law enforcement's BAC investigations. The question presented here is whether this practice falls within A.R.S.§28-692 (j) that allows police officers to collect blood that has been drawn for medical purposes. Answer-yes. The court's holding is that the entire sample is drawn for medical purposes within the meaning of the statute, and the officer's subsequent request for a portion, does not violate any of the defendant's rights.

***State v. Davis,* 261 Ariz. Adv. Rep. 24 (CA 2, 1/21/98)**

The defendant was arrested on 1/13/96. At arraignment he was informed of his pre-trial conference date and released on these charges. However, he had a DOC hold for parole violation and was sent to prison, unbeknownst to the prosecution or the court. He was released 11 months later and moved to dismiss for speedy trial violation. The court held that rule 8.2 limits do not apply to imprisoned defendants and rule 8.3 applies. Under that rule, the defendant has to request speedy disposition. Since he knew of the pre-trial date and failed to notify the court, there was no speedy trial violation.

***State v. Brooks,* 261 Ariz. Adv. Rep.22 (CA 2, 1/21/98)**

The defendant was arrested on a drug offense. He was on probation for assault and a petition to revoke was filed. He eventually pled to the new charge and was sentenced to prison on both to concurrent sentences. The trial court gave him credit for time served only on the probation violation. The court of appeals held that he is entitled to credit on both charges because he was incarcerated pursuant to the drug charge even though he had a probation hold and therefore A.R.S. § 13-709 (B) requires he be given credit.

***State v. Magner,* 261 Ariz. Adv. Rep. 8(CA 1, 1/27/98)**

The defendant was stopped for speeding by a DPS officer. The officer's suspicions were aroused that the defendant may be transporting drugs and he asked permission to search his car. When he refused, he was told he could not leave and the officer called for a drug detection dog. Forty-five minutes later, a dog arrived and alerted on the trunk, at which point the defendant was arrested and his trunk opened wherein was located marijuana. The defendant's motion to suppress raised the question of whether there was reasonable suspicion to support the officer's detention of the defendant while he got the dog. The officer's observations were that he avoided eye contact, the car registration was on the front seat, that he had a tie on but was wearing jeans, that he was coming from Tucson, that his car was dirty, and that he had an overnight bag on the back seat not in the trunk. The court of appeals determined that none of these by themselves or together comprise reasonable suspicion sufficient to detain the defendant, therefore the motion to suppress should be granted.

***State v. McDonald,* 261 Ariz. Adv. Rep. 3 (CA 1, 1/21/98)**

A person can be convicted of operating a house of prostitution even if she is acting alone and in her own house. A.R.S. §13-3208(B) is not void for vagueness.

(cont. on pg. 10) ☞

Goddard v. Superior Court, **262 Ariz. Adv. Rep. 11 (CA 1, 2/10/98)**

The question presented here is: does Prop. 200 mandate probation for a person convicted of possession of narcotic drug when he has two priors for possession for sale? The answer is no. Prop 200 (13-901.01(G)) excepts those with three convictions of possession from mandatory probation. The court here holds that common sense dictates that possession for sale, as well as any other felony not enumerated would do the same. (Petition for Review has been filed.)

State v. Alatorre, **262 Ariz. Adv. Rep. 8 (CA 1, 2/3/98)**

The defendant was convicted of various child sex offenses. The state introduced statements made by the victim to a police officer about events that she was unable to recall at trial. The court held that rule 803(5) allows such evidence here because the victim testified that she remembered the events more clearly when she talked to the cop, that her memory had diminished, that she spoke truthfully to the cop, and that she told him everything she remembered. The cop testified that the tape recording was accurate. Therefore the recording was admissible. Evidence of other uncharged acts were admissible as emotional-propensity evidence.

State v. Garcia-Contreras, **262 Ariz. Adv. Rep. 13 (S Ct 2/12/98)**

Because the defendant's civilian clothing had not arrived, he was given the choice of appearing in jail garb or not attending jury selection. The Supreme Court held that in denying the request for a short continuance, the trial court effectively denied his right to be present for jury selection, as there was no valid choice.

State v. Pope, **262 Ariz. Adv. Rep. 17 (CA 1, 2/12/98)**

The defendant was charged with murder, several counts of aggravated assault dangerous, and endangerment. The charges exposed him to a maximum sentence of 81 years. The state offered to stipulate that any sentences imposed would be concurrrent and not exceed 30 years. The trial court entered an order that regardless of the verdicts, no consecutive sentences would be imposed. He was tried to a jury of eight people. Since Ariz. Const. Art. II, §23 entitles one to a 12 person jury if the *possible* sentence exceeds 30 years, the conviction was reversed.

State v. Garland, **262 Ariz. Adv.19 (CA 1, 2/12/98)**

The defendant was charged with pointing a gun at two reporters doing a story at a Van Buren motel. When they fled, the defendant took their camera. The next day at the same motel, he pointed a gun at a motorist and demanded a ride. Later he took the motorist's ring, watch and money. The two offenses were joined for trial. The court reversed saying they were not of the same or similar character nor part of a common scheme or plan and should have been severed under *State v. Ives*.

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

United States v. Keys, **133 F.3d 1282 (9th Cir 1998)**

Keys was a defense witness in a criminal case, called to impeach a government witness. He testified that the government witness said he would lie for the government in exchange for leniency in his own case. At the trial Keys himself was impeached with a note that was found hidden in a magazine he had asked a guard to deliver to the defendant on trial. The note was addressed only to "G",was signed "That guy" and indicated the writer was "ready... I hope I can make a difference...." It mentioned the defendant awaiting trial was to send money for Keys' use in prison. On cross examination Keys denied any knowledge of the letter.

Keys was tried for perjury on the basis of this letter, again claiming that he did not write it, or know of it. Consistent with long standing precedent, the issue of the materiality of the statement (letter) was not submitted to the jury, although it was an element of perjury. Instead the approved procedure was for the court to determine materiality as a matter of law. Keys' defense was that he did not write the letter. After his conviction, the Supreme Court ruled, in another case, that failure to submit an element to the jury was unconstitutional. This issue was not waived by Keys' failure to object, or ask for such an instruction, as the settled law was against granting such a motion. The materiality of the perjury in the first trial was clear, as his credibility in impeaching the government witness was material. Although the procedure in his trial was plain, he did not get the benefit of this clarification of the law because, given the facts, and the defense, the error could not have affected substantial rights.

United States v. Thomas, **134 F.3d 975 (9th Cir. 1998)**

On trial for conspiracy to possess methamphetamine with intent to distribute, and aiding or abetting same, Thomas' defense was entrapment. He was

(cont. on pg. 11) ☞

precluded from testifying as to his lack of a criminal record, or prior conduct to rebut predisposition. The elements of entrapment require some proof that the defendant was not predisposed to commit the crime induced by the government agent.

Thomas had a friend, Crosthwaite, whose car was seized as he tried to cross the U.S.-Mexico border illegally. Crosthwaite ran into a childhood pal named Barruetta while trying to get his car back. Barruetta was a professional informer for the DEA, and offered to get the car back, and a permit for Crosthwaite to live in the U.S., for $1000.00. Over the next several weeks, Barruetta took Crosthwaite illegally across the border, and discovered Crosthwaite was a drug *user*. Barruetta told his DEA handler that Crosthwaite distributed pounds of meth monthly. Without verifying any of this, the DEA agent agreed to pay Barruetta a fee on a successful sting.

At Barruetta's request Crosthwaite looked for a source for meth. Eventually he contacted his pal Thomas, an occasional meth user who had twice sold Crosthwaite a $20.00 single dose of meth bought for personal use. Barruetta was introduced to Thomas, and persisted in asking Thomas to arrange a drug deal, despite initial refusals. Thomas claimed that resolution of Crosthwaite's car and immigration problems were promised as inducement, along with offers of marijuana and cocaine, all of which the government denied. Thomas finally agreed on the condition he would not have any more contact with Barruetta, and Crosthwaite would be present. At least three months after the snitch ran into Crosthwaite, the sale of 3 lbs of meth for $25,000 was set up, and Thomas arrested.

The conviction is reversed. Thomas should have been allowed to testify as to lack of arrests, etc. under Federal Rule of Evid. 404(b) (lack of prior bad acts equals prior good acts) and/or 405(b) (proof of character or trait is an element).

***United States v. Foster,* 133 F.3d 704 (9th Cir. 1998)**

Foster was stopped while driving his pickup truck. In the bed of the truck, under a tarp that was snapped down, in a zipped-up bag, was a loaded gun, next to a bucket containing evidence of his drug sale business. Foster was arrested for drug charges, plus a count of "carrying a firearm during and in relation to a drug trafficking crime." That offense can also be prosecuted as "use" of a firearm during and in relation to a drug offense. After Foster's convictions, the U.S. Supreme Court in *Bailey v. United States* clarified, and restricted, the interpretation of "use" in this statute. Although Foster was never charged with "use," this court reexamines the meaning of "carry" in light of that decision.

In a whimsical stroll through statutory construction and the English language, this court decided that "carry" is to be narrowly defined as: transport on or about the person; immediately available for use by the person; within easy reach. This might be satisified, for example, by a gun in a glove compartment as one drives, but not dissassembled, in a locked compartment for which the accused does not have a key. There is supposed to be some distinction between "carry" and "possess" or "transport", just as between "use" and "possess" under *Bailey*.

The dissent argues that this interpretation must be incorrect because criminals, and drug traffickers who want a weapon handy, will avoid conviction merely by making their gun inaccessible until they need it. It also points out that "readily accessible" would change if a traffic cop directed Foster to move to the back of the truck. And it mildly chastises the tone of the opinion as somewhat lighthearted or self indulgent.

***LaGrand v. Stewart,* 133 F.3d 1253 (9th Cir. 1998)**

Upholding Arizona court's 1982 interpretation (and later affirmance) that "pecuniary gain" aggravating factor was present for death penalty purposes, where the killing was generally in furtherance of the scheme to commit robbery.

Appellants are brothers who were German nationals when arrested. A law requiring state authorities to inform them of their right to contact their consulate upon arrest was violated. In the course of finding that this claim was waived by failure to raise it earlier, the court discusses the merits. Appellants claim that this error kept them from being able to prove they are "actually innocent" of the death penalty. Actual innocence of the death penalty looks at eligibility that was shown, not additional mitigation that might have been. Here, evidence of troubled or abusive childhood would not be relevant to the findings of pecuniary gain, nor cruel, heinous or depraved.

Although felony murder does not have any lesser included offenses, the LaGrands' jury was also instructed on first degree premeditated murder, and lessers of that charge, besides other counts. This did not present an impermissible choice between acquitting or convicting a defendant charged in a capital case that was condemned in *Beck v. Alabama*.

Karl LaGrand confessed on arrest, admitting that he stabbed the murder victim, and saying his brother

(cont. on pg. 12) ☞

Walter did not stab anyone, and was in another room when the stabbing occurred. A survivor of the robbery saw both men struggling with the victim just before she herself was stabbed by Walter. One later said "just be sure he's dead." The confession was excluded from the state's case in chief due to a Miranda violation. Walter wanted to introduce it in his own defense, using Rule of Evid. 804(b)(3) - hearsay exception when witness is unavailable, and statement is against interest of declarant. Appellate courts had already affirmed, based on lack of reliability, in the exonerating statements. This court notes that the two statements, that Karl did stab someone, and the portions exculpating Walter, had to be analyzed separately. The portions exculpating Walter were not admissible as against Karl's interest, therefore there was no corroborating circumstances indicating reliability, as required by the rule. In addition, the eyewitness and forensic evidence tended to contradict the exculpatory portion.

Karl made a claim that his lawyer was ineffective for not interviewing, or cross examining witnesses, not making an opening statement, being inexperienced, not pursuing impulsivity and insanity defenses and choosing to use his suppressed confession at sentencing. The interviews were done by a previous lawyer, and trial counsel had the transcripts, and interviewed the most important witness. He cross examined only two of eighteen witnesses because, for the most part, the codefendant's cross examination was sufficient and helpful to Karl. Some motions were filed by trial counsel, and he joined in others of the codefendant's counsel. The confession was kept out where it would do the most damage, at the trial by jury, but used in mitigation in front of the judge. Counsel reserved opening, but then decided not to present evidence. Although he kept a lower profile than expected in a capital case, it was not unreasonable, as nothing would be gained by repeating the inquiries or arguments of co-counsel. Investigation had been done into using impulsivity and insanity, but reasonably rejected as a poor choice. His trial attorney's affidavit to the effect that his performance was deficient, did not persuade anyone except the Attorney General, who sent it to the State Bar, and proceeded to argue that counsel was not ineffective.

***Carriger v. Stewart,* 132 F.3d 463 (9th Cir. 1997)**

Carriger was convicted of murdering a Tucson jewelry store owner during a robbery. Dunbar, someone he had known in prison, and lived with at the time of the murder in 1978, was a government witness against him, providing before trial, and from the stand, most of the evidence to convict. Carriger always claimed he was innocent, framed to cover Dunbar's crime. After decades of post-conviction proceedings it is admitted by all that Dunbar was a lifelong, inveterate liar of huge proportions, who would routinely sell false information to the authorities in exchange for better treatment in his own problems. He also had the opportunity to arrange for all the physical evidence that was against Carriger. Other witnesses, at least to some degree, backed up the claim that Dunbar admitted lying about Carriger. His conviction was reversed after 19 years in custody, essentially because the state only disclosed a small portion of the impeaching material about Dunbar, compounding this when they vouched for Dunbar in closing.

Carriger claims that all available evidence now proves that he is actually innocent. This court does not grant relief on that ground, because Carriger has not met his burden of proof, which is "extraordinarily high" when such a claim is made after a valid conviction.

But arguments regarding constitutional violations during trial, coupled with the evidence of innocence, combine to bring him into a "narrow class of cases...implicating a fundamental miscarriage of justice." This creates a "gateway" through which this court may consider the merits of arguments otherwise barred procedurally. The quantum a petitioner must show to reach this point is described as such that, in light of all the evidence now available, it is more likely than not that no reasonable juror would find guilt beyond a reasonable doubt. To get the court's consideration, a claim of constitutional error must combine with evidence of innocence "such that a court cannot have confidence in the verdict." Based on this standard, the Brady violations of the prosecution in not turning over material about Dunbar's past activities can be considered, and win him a new trial.

***Bonillas v. Hill,* 134 F.3d 1414 (9th Cir. 1998)**

Appellant was found guilty by a jury. The verdict was "guilty of the crime of murder, as charged in the Information..." and included a special finding that it was committed during the commission, attempt, or flight from a burglary. The jury was excused for a five day recess preceding the penalty phase. A statute provided that when the jury fails to specify the degree of a crime which is distinguished by degrees, the verdict is deemed to be the lesser degree. Appellant raised this issue during the five day recess. The court, rather than designate the verdict second degree murder, called the jurors back, and gave instructions and two verdict forms, for first and second degree murder. This did not violate the double jeopardy clause. The lack of designation was not an acquittal of first degree. The state's only theory at trial was felony murder which was clearly intended by the special findings, and the verdict was incomplete, allowing the jury not yet discharged, to continue as directed. ■

THE VOLUNTEER LAWYERS PROJECT

The Volunteer Lawyers Project (VLP) provides access to legal services for the poor and near poor in Arizona, through clinics and other programs. The VLP is willing to present a one hour seminar called "Pro Bono and Public Attorneys" which discusses the ethical parameters, and other issues, that arise for public defenders doing outside pro bono work. The VLP can also present a two hour seminar on landlord/tenant law which would provide enough information for any lawyer to participate in one of VLP's most popular pro bono opportunities, the landlord/tenant intake legal clinic.

Either seminar qualifies for the CLE ethics requirement, and could be presented at lunchtime or after work in our training facility. If you are interested in either seminar, or for more information, please contact Cliff Levenson via e-mail or at 506-2228. If there is enough interest, these seminars will be scheduled soon. ■

BULLETIN BOARD

Attorney Moves/Changes

Because of the significant growth of our trial groups (approaching 40 attorneys each), a new position has been established, **Trial Group Counsel**. The position will assume supervisory responsibility within each trial group over all Attorney I's, II's, and newly hired III's (and higher.) It will enable us to provide greater mentoring, training, and supervision over our newer and less experienced attorneys. The Trial Group Supervisor will continue to supervise the remainder of the attorneys in each trial group and direct the general affiars of the trial group. The new Trial Group Counsel are:
Shelley Davis - Group A
Terry Bublik - Group B
Paul Ramos - Group C
Jeremy Mussman - Group D

Additionally, a **DUI Unit** has been formed to handle cases from Groups A, B, and D. **Dan Carrion** has been named supervisor of the group. Attorneys slated to join the new Unit are **Bob Jung** from Group D, **Tom Timmer** from Group A, and **Tammy Wray** from Group A.

Ronee Korbin, Defender Attorney with Group D, will be leaving the office effective March 31. She will be entering private practice with Scott Saidel, P.C.

Support Staff Moves/Changes

Debbie Brink, from Group B, has been named the new supervisor for the Litigation Assistant/Law Clerk staff. Debbie will supervise the other 8 litigation assistants as well as the 4 trial division law clerks.

Marcia Linden, will fill the litigation assistant position vacated by Debbie Brink, in Group B. Marcia has been a legal secretary in Group D since 1996.

Pam Davis, has been chosen to become the new supervisor for the trial division Client Service Coordinators. In addition to her new duties, she will continue to serve as a capital mitigation specialist.

Patty Winter, a four-year veteran with Group C, recently as the DFM, left the office effective March 25. We wish her luck in her new ventures.

Sylvia Ybarra, Legal Secretary for Group A, bid a fond farewell to the office on March 20. Sylvia has been with the office since 1990 and will be heading for the Federal Public Defender's Office. ■

February 1998
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
1/2-2/23	Ellig/ Robinson	Dougherty	Dyanne Greer	CR 95-10998 Child Abuse/F3	Not Guilty Child Abuse/F3 Guilty Class 6 Felony	Jury
1/6-1/13	Likos	Baca	Roberts	CR 97-09216 Sex Assault/F2, Kidnap/F2	Not Guilty	Jury
1/27-1/28	Kent	Arrellano	Terri Clarke	CR 97-02053 Assault/M3; Burglary 2°/F3; Trespass/ F6;Theft/M1	Directed Verdict Assault/M3; Guilty Trespass/M1 Burglary Dismissed	Bench
2/5-2/6	Leal	Baca	Gadow	CR 97-08758 Escape/F6; Resist Arrest/F6, Driving on a Suspended License/M1	Not Guilty Escape/F6 and Resist Arrest/F6; Guilty Driving on a Suspended License/M1	Jury
2/9-2/17	Tosto/ Clesceri	Gerst	Morton	CR 97-05068 2 Cts. Sex Abuse/F3; Att. Sex Abuse/F4; Indecent Exposure/F6	Not Guilty Sex Abuse; Att. Sex Abuse and Indecent Exposure Dismissed	Jury
2/9-2/17	Porteous/ Jones	Baca	Lawritson	CR 97-06245 Agg. DUI w/prior, on probation	Not Guilty Agg. DUI; Guilty Driving on Suspended License	Jury
2/10-2/18	Passon/Jones	Padish	Rehm	CR 97-05593 Agg. DUI/F4	Guilty	Jury
2/12-2/17	McAlister	Yarnell	Robinson	CR 97-07521 Burglary/F3; Theft/F4	Guilty	Jury
2/12-2/19	Davis/ Robinson	Dunevant	Sobalvarro	CR 97-07933 Agg. Assault on Police Officer/F5	Reduced to Class 6 before closing, hung jury	Jury
2/19-2/23	Leal	Galati	Freeman	CR 97-12068 Trespass/F6; Agg. Assault/F6	Client pled to one count of Misdemeanor Trespass during Trial	Jury
2/19-2/25	Timmer/ Jones	Chavez	P.Davidon	CR 96-10663 POM for Sale/F2; Transportation of Marijuana/F2	Guilty on both counts	Jury
2/24-2/24	Ryan	Johnson	David Park	TR 97-04481 Driving under Influence/M1; Blood Alcohol Content over .10/ M1	Not Guilty	Jury
2/24-2/26	Reece	Dunevant	Morrison	CR 96-09542 Agg. DUI/F4	Not Guilty Agg. DUI; Guilty Driving on Suspended License/M1	Jury

(cont. on pg. 15) ☞

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/24-2/27	Green	Cole	Susan Brnovich	CR 97-02060 Agg. Assault Dang./F3; Kidnapping/F2; Burglary 2°/F3	Guilty	Jury
2/25-3/2	Tosto/ Clesceri	Skelly	Davis	CR 97-08294 Theft/F5	Not Guilty	Jury
2/25-3/9	McAlister & Lehner	Galati	Williams	CR97-04896 Child Molest/F2; Sex Assault/F3; Sex Abuse w/Minor/F5	Not Guilty	Jury

GROUP B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
02/02-02/04	Burns/ Ames	McDougall	Dion	CR 97-05669 Ct. 1 Aggravated Assault/F3 Ct. 2 Kidnapping/F2	Count 1 - Not Guilty -- Guilty of Lesser Included Simple Assault/M1 Count 2 - Guilty	Jury
02/02-02/04	Landry	Martin	Anthony	CR 97-06940 POND for Sale + Threshold/F2	Not Guilty	Jury
02/02-02/-05	Brown, J./ Corbett	Martin	Mitchell	CR 97-00144 Sexual Conduct w/Minor/F2	Guilty	Jury
02/05-02/06	Lopez	Chavez	Boyle	CR 97-06524 Aggravated DUI/F4	Guilty	Jury
02/09-02/13	Newhall/ Castro	Grounds	Gaertner	CR 96-13556 2 Cts. Aggravated Assault/F3D	Mistrial	Jury
02/13-02/20	Brown, L./ Corbett	Sticht	Williams	CR 97-02598 Aggravated DUI/F4	Not Guilty of Agg. DUI -- Guilty of Lesser Included Driving on a Suspended License, M1	Jury
02/19-02/20	Navidad	McDougall	Grimes	CR 97-01070 Grant Theft Vehicle/F3	Guilty	Jury
02/20-02/20	Washington	Ortiz	Sampanes	TR 97-08111 DUI/M1	Guilty	Jury
02/23-02/23	Roth	Gutierrez	Sampanes	MCR 97-02876 Interference with Judicial Proceedings/M1	Guilty	Bench

(cont. on pg. 16) ☞

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
2/4-2/5	Rosier/ Thomas	Scott	Gingold	CR 97-92164 2 Cts. Agg DUI/ F4	Guilty	Jury
2/11-2/12	Nermyr	Scott	Brenneman	CR 97-93165 Agg Asslt/ F4D Asslt/ M1	Agg Aslt - Guilty Aslt - Not Guilty w/one prior	Jury
2/13-2/17	Schmich	Pearce	Arnwine	TR 97-01995CR 2 Cts. DUI/ M1	Not Guilty on both counts	Jury
2/17-2/19	Coolidge	Ellis	Stelly	CR 97-90561 2 Cts. Agg DUI/ F4 6 Cts. Endang/ F6D 2 Cts. Agg Asslt/ F3D 1 Ct. Lv Scn of Acct/ F3	Guilty on all	Jury
2/23-2/24	Schmich	Grounds	Aubuchon	CR 97-90843 Theft of Credit Card/ F5	Not Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
1/28-2/5	Billar	Gerst	Davidon	CR 97-04541A 1 Ct. Man. Meth./ F2; 1 Ct. Miscndct Inv. Weapons/ F4; 1 Ct. Poss Eqp/Chm Mnu D/Dr/ F4	Guilty	Jury
2/2-2/10	Wilson/ Bradley	Katz	Williams	CR 96-11750 Kidnap/ F2 Burglary 2/ F3 2 Cts. Sex Abuse over 15/ F5	Not Guilty All Counts	Jury
2/3-2/5	Stazzone	D'Angelo	Neal	CR 97-10133 POND/F4	Guilty	Jury
2/9-3/2	Beckman/ Feldman	Kamin	Imbordino	CR 96-07192 Murder 1st Degree	Guilty	
2/11-2/11	Carrion	Padish	Moore	CR96-11703 Agg Dr-BA .10 or Gtr/F4 Agg Dr-Lq/Drg/Tx Sub/F4	Not Guilty on 2 Agg. DUI Guilty on Misdemeanor DUI	Bench
2/18-2/20	Billar	Bolton	Gialketsis	CR 97-00655 Misconduct Inv. Wpn/ F4	Guilty	Jury

(cont. on pg. 17) ☞

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/23-2/25	Stazzone	O'Melia	Pacheco	CR 97-07776 POND/F4	Guilty	Jury
2/26-2/26	Elm	Gerst	Hauert	CR 97-05687 Agg. Asslt./ F6 Trespass/ F6 Agg. Asslt./ M1 Disorderly Conduct/ M1	Dismissed before trial started	Bench
2/27-3/2	Gavin	Chavez	Neugebaue	CR97-11616 POND/F5	Not Guilty	Jury

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
1/15-2/19	Orent/Soto	Ishikawa	C.Smyer	CR96-93565 Attmp.Murder 2/F2 Agg.Assault/ F3D	Dismissed Not Guilty	Jury
2/12-2/25	Miller/Soto	Martin	J.Charnell	CR97-06447 Theft/ F3 Armed Robbery/ F2D Murder 1/ F1D	Hung Jury–7 guilty; 5 not guilty	Jury
1/28-2/11	Steinle-Advisory Counsel	Bolton	C.Nannetti	CR95-02955 Sex. Miscndct w/mnr/ F2D 4 Cts. Child Molest/ F2D Public Indecency/ F6	Guilty	Jury
2/21-2/23	Ivy/Apple	Dougherty	D.Greer	CR95-10998 (c) Child Abuse/ F3	Guilty, Lesser Included Negligent Child Abuse Under Circumstances other than those likely to cause death or serious physical injury/ F6	Jury

1997 Trial Results

Based on Results Reported to *for The Defense*

1997	Guilty	Not Guilty	Guilty-Lesser	Guilty-Fewer	Hung	Mistrial	Dis-missed	Pled	DV	With-drew	Total
A	36	22	16	5	4	4	1	1	1	1	91
%	39.6%	24.2%	17.6%	5.5%	4.4%	4.4%	1.1%	1.1%	1.1%	1.1%	
B	41	25	10	13	8	5	1	1	1		105
%	39.1%	23.8%	9.5%	12.4%	7.6%	4.8%	1%	1%	1%		
C	41	14	6	8	5	2	2	1			79
%	51.9%	17.7%	7.6%	10.1%	6.3%	2.5%	2.5%	1.3%			
D	57	22	10	11	6	4	6	2	1		119
%	47.9%	18.5%	8.4%	9.2%	5%	3.4%	5%	1.7%	.8%		
LD	16	8	10	6	3						43
%	37.2%	18.6%	23.3%	14%	7%						
Total	191	91	52	43	26	15	10	5	3	1	437
%	43.7%	20.8%	11.9%	9.8%	6%	3.4%	2.3%	1.1%	.7%	.2%	

(These stats do not include justice court trials, which are not consistently reported in the newsletter; 49 were reported in 1997.)

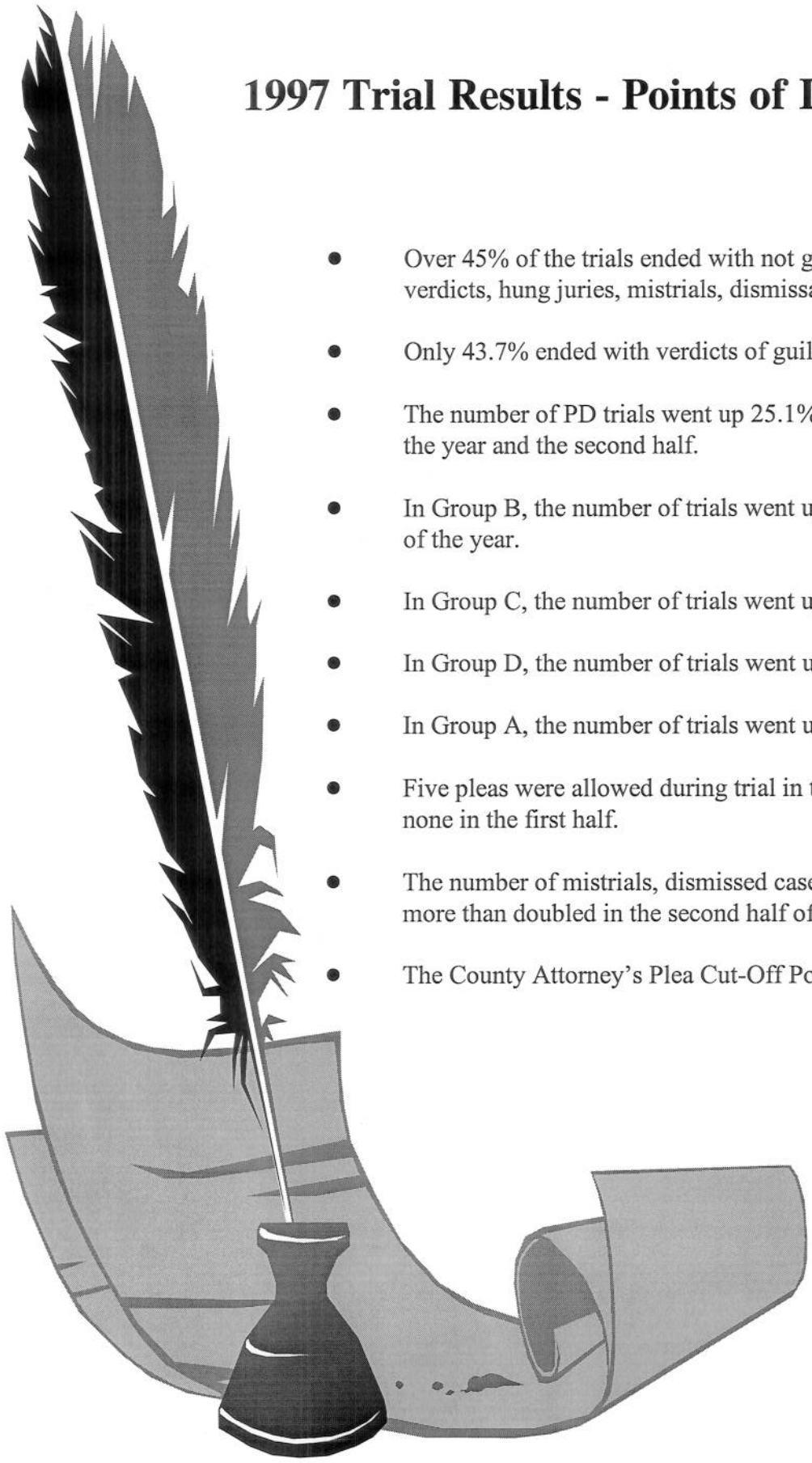
1997 Trial Results - Semi-Yearly

Based on Results Reported to *for The Defense*

Jan-Jun 1997	Guilty	Not Guilty	Guilty-Lesser	Guilty-Fewer	Hung	Mistrial	Dis-missed	DV	Pled	With-drew	Total
A	20	6	11	4	3	1					45
B	16	10	4	5	3	1		1			40
C	16	8	1	2	5	1					33
D	24	12	7	4	4	2	3	1			57
LD	4	7	6	4	1						22
Total %	80 40.6%	43 21.8%	29 14.7%	19 9.6%	16 8.1%	5 2.5%	3 1.5%	2 1%	0 0%	0 0%	197

Jul-Dec 1997	Guilty	Not Guilty	Guilty-Fewer	Guilty-Lesser	Hung	Mistrial	Dis-missed	Pled	DV	With-drew	Total
A	16	16	1	5	1	3	1	1	1	1	46
B	25	15	8	6	5	4	1	1			65
C	25	6	6	5		1	2	1			46
D	33	10	7	3	2	2	3	2			62
LD	12	1	2	4	2						21
Total %	111 46.3%	48 20%	24 10%	23 9.6%	10 4.2%	10 4.2%	7 2.9%	5 2.1%	1 .4%	1 .4%	240

1997 Trial Results - Points of Interest



- Over 45% of the trials ended with not guilty or lesser-included verdicts, hung juries, mistrials, dismissals, or directed verdicts.
- Only 43.7% ended with verdicts of guilty on all charges.
- The number of PD trials went up 25.1% between the first half of the year and the second half.
- In Group B, the number of trials went up 62.5% in the second half of the year.
- In Group C, the number of trials went up 39.4% in the second half.
- In Group D, the number of trials went up 8.8% in the second half.
- In Group A, the number of trials went up 2.2% in the second half.
- Five pleas were allowed during trial in the second half of the year; none in the first half.
- The number of mistrials, dismissed cases, and directed verdicts more than doubled in the second half of the year, from 10 to 22.
- The County Attorney's Plea Cut-Off Policy became effective July

INSIDE ADDITION

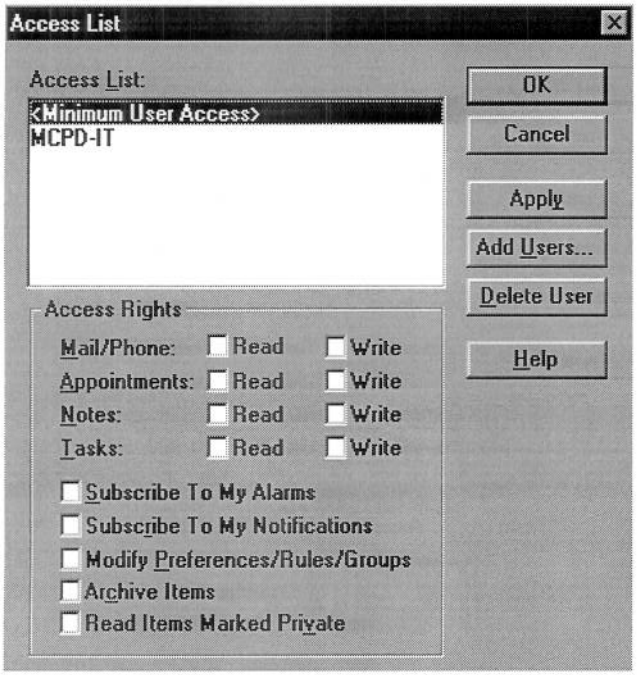
The Insider's Monthly March 1998

COMPUTER CORNER

By Susie Tapia
Information Technology

Access to the World - a.k.a. - Proxy Rights

Have you inadvertently given everyone in the Public Defender's Office access to your GroupWise? It's easy to do. To make sure you are safe from intruders open your GroupWise then choose **File, Preferences, Access List**. Click once on the **Minimum User Access**. Are there any check marks under the **Access Rights** options? If so, then you have given all the users on your post office access to your GroupWise. To remove the access, unmark any box(es), click on the **Apply** button, then choose **OK**. If you only unmark the Rights but do not choose Apply the access will be returned upon clicking OK.



Exceeding the Limits - 200mph (*M*ail *P*iled *H*igh)

Are you exceeding the limits? Do you have more than 200 **UNREAD** messages in your In Box? The GroupWise error log indicates that several people in our offices have more than 200 messages in their In Boxes.

If you use only the notifier to indicate which messages to read you may be missing out. When a message is highlighted in the notifier and you choose Read, the notifier starts with that messages date and time and then proceeds forward to the next new message. It can not open older dated mail. Therefore any message with an older date and time will not get read unless you scroll through your In Box and select them.

Open your **In Box**, the number on the bottom right indicates the total messages in the In Box. Scroll up through your In Box, do you see any icons (pictures) of closed envelopes? Those are unread messages. These unread messages will stay in your In Box **forever** until you either read them and the system cleans them out or you delete them.

Total Messages 

Unread Message 

Read Message 

Less is more...

Faster that is. If your GroupWise seems to take a long time to load check the number of messages, the more you have the slower it will be. Clean up these old messages. Some that I've seen date back to over a year ago. Think of the mold growing on those!

Happy Computing!
Contact the Help Desk for assistance x66198.

TRAINING NEWS

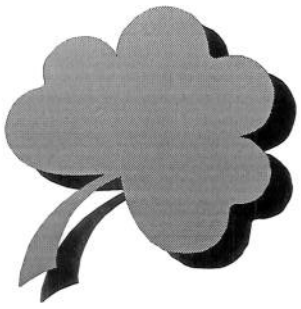
By Lisa Kula
Training Administrator

FREE MONEY

Just a reminder, the county tuition reimbursement fund is free money. If you are considering taking a class from an accreditated institution, please remember to fill out a tuition reimbursement form before registering. It's Free Money!

Second quarter training catalogs are now available. Please contact your supervisor if you haven't already received one. The catalog is also saved on the s-drive under s:\Training\ctyctlg\2ndqtr. If you are interested in registering for a class, fill out the application, have your supervisor sign off and forward directly to the County's Organizational Planning and Training Department. Many of the most popular classes fill quickly, and they take registration on a first come, first served basis. Classes with a fee **must first** be forwarded to our Training department. OPT supplies the office with quarterly attendance lists, so Training can track class hours for each employee.

Be sure and mark your calender for the Cultural Diversity class on April 24. The class will emphasis cultural differences that can lead to misunderstandings or even legal problems. It will focus on language and cultural issues confronting those in the indigent representation field.



Please forward any requests you may have for future training classes to the Training Administrator.

COMMUNITY CORNER

ERGONOMICS TIPS

If you work at a computer or write at a desk for two or more hours a day, be sure to keep these simple tips in mind.

Once every hour, stop and do simple exercises at desk.

Do not bend over to pick up a pencil, etc.; stoop down, bending your knees and not your back.

Monitor: 1) should be clean to avoid eyestrain and craning necks to read. Clean at least once a week (once a day would be ideal).
2) height--top of monitor (not top of screen) should be at eye level or slightly below, unless you wear bifocals and then top of monitor should be at chin level.
3) closeness--keep close so that you don't crane neck (causing neck pain) or lean into screen (causing low-back pain).

Monitor should have a light background with dark letters.

Desk Height: put fingertips on shoulders, keeping elbows tight to sides, move into desk and desktop should hit anywhere from elbow tips to up to 2-3 inches up from elbows.

Keyboard: wrists should be perfectly flat (should be able to put pennies on wrists while typing and pennies will not fall off). When arms at sides and elbows bent at 90· angle, fingertips should hit keyboard with wrists perfectly flat.

Chair: When seated, feet should be comfortably flat on floor while keyboard is still at proper height. Use a footstool if necessary. Chair cushion should be soft enough that you could push down ½ to 1 inch. Chair back should support small of back (don't perch on edge of chair). Chair seat should tilt down slightly in front so that circulation in legs is not cut.

PERSONNEL PROFILE

Amy Bagdol
Administrative Coordinator

Amy has been with the Public Defender's Office since 1982. She began as a Secretary and worked her way up to her current position. Currently, she is responsibile for the lead and juvenile secretaries, and filling secretarial vacancies. In other words, "keeping the place staffed and typing."

What is your idea of perfect happiness? Fitting rooms with no mirrors.

What is your greatest fear? Fitting rooms with 3 way mirrors.

Which living person do you most admire? My mother-in-law.

Which living person do you most despise? The person responsible for the planning and development of Baseline Rd, and the freeway. (Well, maybe I don't despise them, but I really don't appreciate their lack of forethought.)

Who are your heroes in real life? Anyone who works in Indigent Criminal Defense for more than 6 months.

Who is your favorite hero of fiction? Mulder & Scully.

What is the trait you most deplore in yourself? I don't deplore any traits in myself.

What is the trait you most deplore in others? Disingenuousness, "I told you so'ers" and one upmanship in any form.

What is your greatest extravagance? Camel filters soft pack.

On what occasion do you lie? When I'm tired. Haha. I can rarely pull off a lie, it shows straight through.

If you could change one thing about yourself, what would it be? I'd be a better liar.

What do you consider your greatest achievement? Longevity in work and marriage.

What is the quality you most like in a man? Understanding. (and a goatee)

What is the quality you most like in a woman? Understanding. (no goatee)

What do you most value in your friends? Honesty, ability to keep confidences.

If you were to die and come back as a person or thing, what do you think it would be? Any car of mine.

If you could choose what to come back as, what would it be? Any cat of mine.

What is your motto? Enough.

THE LIGHTER SIDE

"Mommy hasta report for jewelry duty."

March IT Puzzle
Luck of the Irish
Before and After Puzzle

1st initial is given
Example: **L**arry **J**ames T. Mathew Kirk Modine Morris

Clue	First Entry	Middle Entry	Last Entry	Clue
Lyricist with Burt Bacharach	**H**			Attorney @ SEF Juvenile
Famous diarist	**A**			Investigator in Group A
Cliff hanging movie serial (*with of*)	**P**			Attorney @ Durango
Voyeur	**P**			Investigator in Group C
Revolutionary War song	**Y**			Something to scribble on
Dependency Attorney	**S**			Voice of Miss Piggy and Yoda
Jamie's movie star dad	**T**			Attorney in Group D
, or . or ; or ! or :	**P**			Attorney in Group C
She wrote 1st equal rights amendment	**A**			Attorney in Group B
Lead secretary in Group C	**T**			Superman's alter ego
Blind R&B singer	**R**			Appeals Attorney
Hot drink with a shot of whiskey	**I**			Late night diner
Attorney in Group D	**C**			Best Actor Oscar for *"The Champ"*
He starred in *Back Draft*	**K**			Training Attorney
This rock group sang *"Hey 19", "FM"*	**S**			Extern Supervisor
Supervisor Group D	**D**			*"Nightmare"* movie site
Leader of Guns and Roses	**A**			Appeals Secretary
Bugs Bunny's gruff frontiersman	**Y**			Supervisor in Group D